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Nos. 91-2034 and 91-2040

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

J.M., Individually,

Petitioner,

—v.—

V.C.,

Respondent.

J.M., Guardian Ad Litem,

Petitioner,

—v.—

V.C.,

Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE NEW JERSEY SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent V.C. submits this brief in opposition to the petitions for a writ of certiorari filed by petitioner J.M., on behalf of himself individually and as guardian *ad litem* for the interests of a fetus. Both petitions seek review of the judgment of the New Jersey Supreme Court below.[1]

COUNTERSTATEMENT OF JURISDICTION

For three reasons, this Court does not possess jurisdiction to review the judgment of the New Jersey Supreme Court. First, there is no jurisdiction to review petitioner's claims as an individual, because those claims are still pending in the Appellate Division of the New Jersey Superior Court, in an appeal as of right that petitioner took from the trial court's decision to dismiss that portion of the complaint. Consequently, there is no "final judgment" by "the highest court of a State in which a decision could be had," and therefore no jurisdiction under 28 U.S.C. § 1257. Second, petitioner lacks standing to assert the interests of the fetus, because a fetus is not a "person" with independent legal rights under the law. Finally, petitioner's assertion that this case implicates his constitutional rights is frivolous, because the rights he asserts protect a person only against *governmental* action, and there is no governmental interference with petitioner's rights in this case. Consequently, no jurisdiction lies to hear the utterly meritless federal questions raised by the petitions.

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[1]Specifically, both petitions seek review of the orders of the New Jersey Supreme Court dated March 24, 1992. Given that petitioner seeks review of judgments entered on the same day, by the same court, in the same action, involving the same parties, respondent is at a loss to understand why petitioner filed two separate, but nearly verbatim petitions. In the interests of judicial economy, this brief is filed in opposition to both petitions.

A. There Is No Final Judgment Regarding Petitioner's Claims As An Individual.

Petitioner initiated this case in the State trial court with a complaint seeking an injunction prohibiting respondent from obtaining an abortion. Petitioner brought the complaint on behalf of himself and as guardian *ad litem* for the fetus. The trial court dismissed the complaint insofar as it was brought on behalf of petitioner individually, but declined to dismiss the complaint brought on behalf of the fetus, and on that basis temporarily enjoined respondent from having an abortion. Both parties sought emergent leave to appeal from the State appellate courts. The New Jersey Supreme Court ultimately granted respondent leave to appeal, summarily reversed and vacated the temporary restraints and summarily dismissed the complaint brought on behalf of fetus. The appellate courts, however, denied petitioner leave to appeal the dismissal of the complaint brought on behalf of himself individually, so that portion of the trial court's decision was never heard by the appellate courts.

Following the New Jersey Supreme Court's order denying him leave to appeal, petitioner returned to the trial court and moved for reconsideration of the order dismissing the complaint brought on behalf of petitioner individually. When the motion for reconsideration was denied, petitioner filed a notice of appeal of the trial court's dismissal of his individual claim. This appeal was as of right and timely filed, and it is still pending in the Appellate Division of the New Jersey Superior Court.[2]

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[2]Petitioner's appeal to the Appellate Division is as of right pursuant to N.J. Ct. R. 2:2-3(a)(1). Although the notice of appeal was filed more than 45 days after the order dismissing the complaint brought by petitioner individually, *see* N.J. Ct. R. 2:4-1 (a), the time for filing was

Under 28 U.S.C. § 1257, Supreme Court review of State court decisions is available only with respect to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." This "final judgment rule" is the first requirement for jurisdiction under Section 1257. Generally, to be reviewable the State court judgment "must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945).

The finality rule "serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs." *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159 (1973).

Although a State trial court order may qualify for review under Section 1257, this is true only if the order cannot be reviewed by *any* State appellate court. *See Grovey v. Townsend*, 295 U.S. 45, 47 (1935). But where there is an appeal as of right in a higher court, or even if discretionary review is available, such review must be sought. *See Benton v. Maryland*, 395 U.S. 784, 786 (1969); *Tumey v. Ohio*, 273 U.S. 510, 515 (1927).

In this case, petitioner has properly taken an appeal as of right from the trial court's decision to dismiss his

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properly tolled by petitioner's motion for reconsideration. *See* N.J. Ct. R 2:4-3 (e); N.J. Ct. R. 4:49-2.

individual complaint, and that appeal is still pending in the New Jersey Superior Court, Appellate Division. The appeal raises all the same federal constitutional issues petitioner seeks to raise before this Court. This pending appeal in the New Jersey State court system bars review of petitioner's claim in this Court.

Citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), however, petitioner argues that the pending State court appeal does not preclude jurisdiction under Section 1257. *See* Cert. Pet. 3.[3] *Cox* represents a line of cases where this Court has found finality under Section 1257, despite the pendency of State court preceedings, in limited circumstances where the federal issues have been finally decided by the State's highest court, the remaining State court preceedings involve only collateral, non-federal issues, and important policy considerations favor immediate review of the federal issues in this Court. *See, e.g., North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. at 159-64.[4]

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[3]Because the petitions at issue are virtually identical, reference throughout is made to the petition in No. 91-2034 as "Cert. Pet.___," and the appendix thereto as "Apx. Vol.__, at__." The appendix to this brief in opposition is cited as "App._a."

[4]*Cox*, 420 U.S. at 479-85, identified four circumstances where finality can exist despite pending proceedings in the State courts: (1) where for all practical purposes the federal issue is conclusively determined, so that, for example, only ministerial acts remain; (2) where the federal issue is finally decided by the State's highest court, and will survive and require review regardless of the outcome of further State court proceedings; (3) where the federal issue is finally decided, but with further proceedings in the State courts, regardless of their outcome, later review of the federal issue cannot be had; and (4) where the federal issue has been finally decided, reversal on the federal issue could be dispositive, and refusal immediately to review the State court decision could seriously erode federal policy.

But although *Cox* represents the "practical rather than a technical construction" this Court has applied to the finality requirement, *see Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949), this approach is not meant to "swallow the rule" of finality embodied in Section 1257, *Flynt v. Ohio*, 451 U.S. 619, 622 (1981), and in situations falling outside the categories mentioned in *Cox*, it still remains true that the existence of pending State court proceedings will preclude review in this Court. In *Flynt*, for example, this Court concluded that it lacked jurisdiction under Section 1257 to review a State supreme court decision rejecting a claim of discriminatory prosecution asserted by the publisher of an allegedly obscene magazine. Although the publisher claimed that the prosecution violated his federal rights, and that a favorable ruling on constitutional grounds would terminate the litigation, this Court found that the State court judgment was not "a final judgment within any of the four exceptions identified in *Cox*," and that Supreme Court review could "await final judgment without any adverse effect upon important federal interests." *Id.* at 621, 622.

None of the *Cox* exceptions to the finality rule apply in this case simply because the New Jersey Supreme Court's decision never reviewed the trial court's dismissal of petitioner's complaint brought on behalf of himself at all, but instead merely denied leave to appeal. The issues raised in petitioner's pending appeal in the New Jersey Appellate Division are not collateral state-law issues, but are the very same federal issues petitioner seeks to bring before this Court. Consequently, petitioner's federal issues have not yet been conclusively adjudicated in the State courts, and there is no final judgment on his federal claims brought as an individual. Therefore, this Court lacks

jurisdiction under Section 1257.[5]

B. Petitioner Has No Standing To Raise Claims On Behalf Of The Fetus.

The law is clear that a fetus is not a person under the Fourteenth Amendment of the United States Constitution. *See infra* at 21-26. The conclusion necessarily follows that "an unborn child and persons acting in behalf of an unborn child may not assert the deprivation of any rights or privileges secured by the Amendment." *Poole v. Endsley*, 371 F. Supp. 1379, 1382-83 (N.D. Fla. 1974), *aff'd in part & remanded on other grounds*, 516 F.2d 898 (5th Cir. 1975). *See also Brady v. Doe*, 598 S.W.2d 338 (Tex. Civ. App. 1980), *cert. denied*, 449 U.S. 1081 (1981); *Rothenberger v. Doe*, 149 N.J. Super. 478, 374 A.2d 57, 58 (Ch. Div. 1977) (dismissing claim to enjoin woman's abortion brought by self-described guardian *ad litem* on

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[5]Petitioner's reliance on 28 U.S.C. § 1651 as an alternative basis for jurisdiction is misplaced. *See* Cert. Pet. 4. Section 1651 authorizes the Supreme Court to issue "all writs necessary or appropriate in aid of their respective jurisdictions." However, as early as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) it was established that the All Writs Act does not, as petitioner suggests, confer, restrict, or expand jurisdiction. Federal courts may issue writs by the authority of Section 1651 only in aid of jurisdiction already conferred. *See Total Care, Inc. v. Sullivan*, 754 F. Supp. 1097, 1103 (W.D.N.C. 1991) (basis for authority to issue an injunction but not a basis of jurisdiction); *Brittingham v. Commissioner*, 451 F.2d 315, 317 (5th Cir. 1971) (by itself creates no jurisdiction in the district courts, but is in aid of jurisdiction previously acquired on some other independent ground); *Haggard v. Tennessee*, 421 F.2d 1384, 1386 (6th Cir. 1970) (power to issue writs "only as ancillary to and in aid of jurisdiction otherwise vested"); *see also Hertz v. Record Publishing Co.*, 219 F.2d 397, 398 (3rd Cir.), *cert. denied*, 349 U.S. 912 (1955); *Hurt v. Cotton States Fertilizer Co.*, 159 F.2d 52, 60 (5th Cir.), *cert. denied*, 331 U.S. 828 (1947); *Covington & C. Bridge Co. v. Hager*, 203 U.S. 109 (1906).

behalf of fetus); *In re D.K.*, 204 N.J. Super. 205, 497 A.2d 1298, 1302-03 (Ch. Div. 1985) (reversing appointment of guardian for the fetus as "unconstitutional and void").

Courts have refused to recognize claims of purported guardians *ad litem* in abortion cases. Guardians *ad litem* for fetuses have been denied standing to intervene and challenge a woman's right to choose abortion, even though the requirements of standing for purposes of intervention are more easily met than those for purposes of bringing a claim. *See, e.g., Woe v. Bear*, No. H-79-1866 (S.D. Tex. May 5, 1980); *Margaret S. v. Edwards*, No. 78-2765 (E.D. La. Oct. 2, 1978); *Akron Center for Reproductive Health v. City of Akron*, No. C78-155A (N.D. Ohio May 16, 1978); *Zbaraz v. Quern*, No. 77-C-4522 (N.D. Ill. May 15, 1978) (subsequent history on merits omitted); *Ryan v. Klein*, 412 U.S. 924 (1973);[6] *Doe v. Bolton*, 319 F. Supp. 1048, 1057 (N.D. Ga. 1970) (three-judge court), *modified on other grounds*, 410 U.S. 179 (1973). *See also* Susan Goldberg, *Of Gametes and Guardians: The Impropriety of Appointing Guardians Ad Litem for Fetuses and Embryos*, 66 Wash. L. Rev. 503 (1991).

Because a guardian *ad litem* can only claim the interests of the fetus he purports to represent, and the fetus is not a "person" under the Fourteenth Amendment,

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[6]In *Ryan*, intervenors purporting to represent embryos and fetuses appealed the ruling of a three-judge court holding unconstitutional New York's refusal to fund legal abortions. In a separate appeal by the State, this Court vacated the district court order and remanded the case for reconsideration in light of *Roe v. Wade*. *Commissioner of Social Servs. v. Klein*, 412 U.S. 925 (1973). On the intervenors' appeal, however, this Court summarily affirmed the district court, thus indicating its refusal to recognize claims of purported guardians *ad litem* in abortion cases.

petitioner has no standing to raise the constitutional rights of the fetus, and that claim is not properly before this Court.

C. Petitioner's Constitutional Rights Under The Fourteenth Amendment Are Not Implicated Because There Is No State Action.

The federal questions assertedly raised by the petition concern petitioner's rights under the Fourteenth Amendment of the United States Constitution. *See* Cert. Pet. 2, 4. But the assertion that respondent's private abortion decision somehow implicates petitioner's constitutional rights is utterly frivolous. The federal constitutional rights cited by petitioner -- the right to procreate, the right to companionship with one's child and to discharge one's duties to one's child, and the right to equal protection of the laws -- protect a person only against *governmental* action. "Individual invasion of individual rights is not the subject-matter of the [Fourteenth] Amendment." *Civil Rights Cases*, 109 U.S. 3, 9-12 (1883); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982). Every case petitioner cites as support for his constitutional claims involves government action affirmatively discriminating against or interfering with the autonomy of private individuals.[7]

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[7]*See Santosky v. Kramer*, 455 U.S. 745 (1982) (*state* may not sever parental rights absent clear and convincing evidence of unfitness); *Craig v. Boren*, 429 U.S. 190 (1976) (*state* may not discriminate on the basis of gender in the sale of alcoholic beverages); *Stanley v. Illinois*, 405 U.S. 645 (1972) (*state* may not sever parental rights based on umarried status); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (*state and federal governments* may not deny welfare benefits to individuals who had resided in the administering jurisdictions for less than one year); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (*state* may not prohibit sale of contraceptives to married individuals); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (*state* may not sterilize persons convicted of crimes);

This, however, is not such a case.

For example, the Constitution certainly protects petitioner's right to be free from government intrusion into his decision to have a child. But it is up to petitioner, not lower court judges, to find a woman who will have a child with him. Rather than seeking protection against state interference with his constitutional rights, petitioner actually seeks to enlist the aid of the courts to seize control of V.C.'s body and compel her to bear his child. But the rights petitioner describes "involve[] a shield for the private citizen against governmental action, not a sword of government assistance to enable [the potential father] to overturn the private decisions of his fellow citizens." *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128, 132 (1974). Petitioner improperly seeks to twist constitutional shields designed to protect individuals from government intrusion, into swords of government coercion to subordinate women.

Thus, because on their face the federal claims petitioner raises are wholly without merit, his mere allegation of a federal question does not establish jurisdiction in this Court. Where, as here, "such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no real room for controversy," no jurisdiction lies. *Equitable Life Ins. Soc'y v. Brown*, 187 U.S. 308, 311 (1902); *see also Zucht v. King*, 260 U.S. 174, 176 (1922).

COUNTERSTATEMENT OF THE CASE

Petitioner, J.M., filed a complaint alleging a

Pierce v. Society of Sisters, 268 U.S. 510 (1925) (*state* may not prohibit parents from sending their children to private schools).

relationship with respondent, V.C., which began in 1991. It is undisputed that the parties are not married. According to the complaint, in January 1992, V.C. became pregnant and decided to seek an abortion.

After retaining an attorney, on March 9th, petitioner filed a complaint in the Superior Court of New Jersey, Chancery Division. That same day, proceeding *ex parte* and without prior notice to V.C., petitioner applied for and was granted a temporary restraining order ("TRO") that, *inter alia*, enjoined V.C. from terminating her pregnancy and from leaving the State of New Jersey for the purpose of terminating her pregnancy. Petitioner's requested relief, and the TRO that was entered, provided no exception should the continuation of V.C.'s pregnancy pose a threat to her life or health.

V.C. moved on notice to dissolve the restraints and dismiss petitioner's complaint for failing to state a claim upon which relief could be granted. On March 19th, after hearing argument from counsel, the trial court (1) dismissed petitioner's complaint to the extent it was brought by J.M. individually for lack of standing; (2) but declined to dismiss the complaint brought on behalf of the fetus; (3) appointed J.M. guardian *ad litem* to represent the interests of the fetus; and (4) therefore continued the restraints imposed on V.C.[8]

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[8] Contrary to petitioner's suggestion, *see* Cert. Pet. 11-12, no trial or evidentiary hearing of any kind was ever held in the courts below, no "testimony" was ever presented, and the trial court never made any factual findings. The "testimony" to which petitioner repeatedly refers, and which is reproduced in the appendix to the petition, consists of affidavits petitioner offered in the court below together with transcripts of testimony *in another case* involving a completely different set of litigants. The Law Division judge in that case found that the "proofs were so limited and so one-sided that a judge cannot sensibly make a

On March 20, 1992, V.C. moved on an emergent basis in the Appellate Division for leave to appeal from the trial court's order imposing the temporary restraints and declining to dismiss the complaint brought on behalf of the fetus. On March 23rd, petitioner moved for leave to cross-appeal from the dismissal of the complaint brought on behalf of himself individually.

On March 23, 1992, after hearing argument from counsel, the Appellate Division: (1) denied J.M.'s motion to cross-appeal the dismissal of his individual action; but also (2) denied V.C.'s motion for leave to appeal the trial court's order denying her motion to dismiss the complaint in its entirety; and (3) granted V.C.'s motion for leave to appeal the trial court's order continuing the temporary restraints and summarily reversed and vacated the imposition of those restraints; but (4) stayed the dissolution of the restraints until 4:00 p.m. the next day.

Both sides sought leave to appeal to the Supreme Court of New Jersey on an emergent basis. V.C. moved to lift the stay, remove the restraints, and dismiss the complaint in its entirety. Petitioner sought to maintain the restraints, reverse the dismissal of his individual complaint, and have the entire matter remanded to the trial court for an evidentiary hearing on his contention that life begins at conception.

On March 24, 1992, determining that petitioner had "failed to demonstrate a reasonable likelihood of prevailing on the merits of his complaint," and concluding "that under current law, plaintiff's proffer of proofs would not realistically assist or inform the court in its determination of

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definite finding of fact based upon them." *State of New Jersey v. Loce*, No. 251-91, slip op. at 8 (N.J. Law Div. Sept. 6, 1991).

the legal issues properly before it," *see* Apx. Vol. II, at 106, the New Jersey Supreme Court unanimously: (1) granted V.C.'s motion for leave to appeal the denial of her motion to dismiss the complaint brought by petitioner as guardian *ad litem* for the fetus, and dismissed the complaint; (2) granted V.C.'s motion to lift the stay of the Appellate Division's order dissolving the temporary restraints entered by the trial court, thereby dissolving the restraints; (3) denied petitioner's motion for leave to appeal the dissolution of the temporary restraints by the Appellate Division, dismissed as moot petitioner's motion for summary reversal, and denied petitioner's motion for a further stay; and (4) denied petitioner's motion for leave to appeal the dismissal of the his individual complaint and dismissed as moot his motion for summary reversal on that issue[9]

On March 31, 1992, petitioner moved in the New Jersey Supreme Court for reconsideration of the dismissal of his claim as guardian *ad litem* for the fetus, and moved in the Chancery Division for reconsideration of the dismissal of his claim as an individual. Petitioner's motion for reconsideration in the New Jersey Supreme Court was denied on April 6th, and his motion for reconsideration in

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[9] Apparently in an effort to characterize the New Jersey Supreme Court's decision as final, petitioner claims that the New Jersey Supreme Court "declared that J.M.'s individual case was 'moot.'" Cert. Pet. 4. This is not true. Rather, the New Jersey Supreme Court merely stated that because petitioner was denied leave to appeal, his *motion* for summary reversal was "dismissed as moot." *See* Apx. Vol. I, at 108-09.

On March 25th, petitioner applied to Associate Justice David H. Souter for a stay of the New Jersey Supreme Court's decision. Justice Souter denied the stay. That same day petitioner reapplied to Associate Justice Clarence Thomas, who also denied the stay.

the trial court was denied on May 12th.

On May 18, 1992, petitioner filed a notice of appeal as of right from the trial court order entered on March 19th dismissing his individual complaint. This appeal is still pending before the Superior Court of New Jersey, Appellate Division.

REASONS THE PETITIONS SHOULD BE DENIED

The petitions should be denied because they fail to establish any of the factors that weigh in favor of review on a writ of certiorari: This Court's prior decisions are dispositive, the New Jersey Supreme Court properly applied those decisions, and no conflict exists among state or federal appellate courts as to the proper disposition of this case. *See* Sup. Ct. R. 10.1. As every appellate court has recognized, and as this Court has just recently reaffirmed, *Roe v. Wade* and its progeny clearly protect the right of every woman, including respondent, to choose to terminate her pregnancy prior to viability.

I. THIS COURT'S PRIOR DECISIONS ARE DISPOSITIVE AND WERE PROPERLY APPLIED BY THE NEW JERSEY SUPREME COURT.

A. Every Woman Has A Constitutional Right To Decide Whether Or Not To Terminate Her Pregnancy.

Petitioner argues that the New Jersey Supreme Court's decision to dissolve the restraints imposed on V.C.'s decision to terminate her pregnancy somehow conflicted with this Court's decisions in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), *Hodgson v. Minnesota*, 497 U.S. 417 (1990) and *Ohio v. Akron Center*

for Reproductive Health, 497 U.S. 502 (1990). *See* Cert. Pet. 57-58. Petitioner makes no serious effort to identify any actual conflict between these cases and the decision of the court below. But insofar as petitioner's argument is comprehensible at all, it appears that he believes that these decisions establish that a woman no longer has a constitutional right to decide whether to terminate her pregnancy, and that in any case respondent's rights are outweighed by the asserted "rights" of petitioner and the fetus. *See* Cert. Pet. 60-61, 63-65. Both claims are demonstrably false.

In 1973, this Court recognized that the Constitution guarantees every woman the right to determine whether or not to terminate her pregnancy prior to viability. *Roe v. Wade*, 410 U.S. 113, 153 (1973). Since that first clear recognition of a woman's right to choose, *Roe*'s holding has been consistently reaffirmed. *See, e.g., Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). More than a decade after *Roe*, this Court reiterated that:

> Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy.

Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986).

Only a month ago, this Court concluded that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." *Planned Parenthood v. Casey*, 60

U.S.L.W. 4795, 4798 (U.S. June 29, 1992).[10] In *Casey*, any questions regarding a woman's right to choose abortion were unambiguously answered:

> An entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe*'s central holding a doctrinal remnant . . . .

Casey, 60 U.S.L.W. at 4803.

Specifically, this Court's decision in *Casey* unequivocally confirmed a woman's constitutional right to choose abortion prior to viability unfettered by State interference:

> The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.

Casey, 60 U.S.L.W. at 4805.

For a State to prevent a woman from obtaining an abortion prior to fetal viability would violate her constitutionally guaranteed right to reproductive autonomy. Although this Court recognized that "the State has legitimate interests from the outset of the pregnancy in

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[10] Contrary to petitioner's repeated insistence here and in the courts below, *see* Cert. Pet. 58-60; Apx. Vol. II, at 67-71, in *Webster* "a majority of the Court either decided to reaffirm or declined to address the constitutional validity of the central holding of *Roe*." *Casey*, 60 U.S.L.W. at 4802.

protecting the health of the woman and the life of the fetus," *Casey*, 60 U.S.L.W. at 4798, before viability "the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Id.* at 4798.[11] Therefore, "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the intimate decision to terminate her pregnancy before viability." *Id.* at 4807.

By seeking a court order absolutely prohibiting V.C. from having an abortion, petitioner would completely obliterate the constitutionally protected right to privacy recognized in *Roe* and reaffirmed in *Casey*.[12]

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[11] Even after viability, a State that chooses to regulate abortion must always provide exceptions to protect the woman's life *and* health. *Casey*, 60 U.S.L.W. at 4798, 4807-08. Thus, this Court continues to reject the argument advanced by petitioner that a State may only allow abortion where necessary to save the woman's life. Cert. Pet. 64 n.46.

[12] Of course, the injunction petitioner sought below constituted State action, even though the operative State actor was a court and not the legislature or executive. "A State acts by its legislature, its executive, or its judicial authorities. It can act in no other way." *Ex Parte Virginia*, 100 U.S. 339, 347 (1880), *quoted in*, *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). There has been no erosion of principle on this issue. "The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment." *Palmore v. Sidoti*, 466 U.S. 429, 432 n.1 (1984). For example, recently this Court broadened the category of potential parties whose actions may fall within the umbrella of State action, by holding that a private litigant's use of preemptory challenges in a civil case to exclude jurors on account of their race, constitutes a constitutional deprivation involving State action. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991). Following this Court, lower courts have consistently held that an injunction prohibiting a woman

Consequently, the New Jersey Supreme Court properly applied this Court's precedent in lifting the restraints imposed on V.C.[13]

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from having an abortion constitutes State action. *See, e.g., Rothenberger v. Doe*, 149 N.J. Super. 478, 374 A.2d 57, 59 (Ch. Div. 1977).

[13] Because petitioner's requested relief in the courts below even prohibited V.C. from leaving the State to obtain an abortion, the injunction also violated respondent's constitutional right to travel. This Court first recognized a right to interstate travel in 1868 when it invalidated Nevada's attempt to tax persons leaving the State. *See Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868). Since *Crandall*, the right to interstate travel has been "virtually unqualified." *Califano v. Aznavorian*, 439 U.S. 170, 176 (1978). As stated in *Williams v. Fears*, 179 U.S. 270, 274 (1900):

> Undoubtedly, the right to locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any state is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.

In 1973, this Court held that State imposed obstructions on a woman's right to travel to obtain an abortion were invalid. Holding that the right to travel "must . . . protect persons who enter Georgia seeking the medical services that are available there," this Court invalidated Georgia's residency requirement for abortion as discriminatory against those women traveling from out-of-state to obtain those services. *Doe v. Bolton*, 410 U.S. 179, 200 (1973). Two years later, this Court stated that Virginia could not "prevent its residents from traveling to New York to obtain those [abortion] services, or, as the State conceded . . . prosecute them for going there." *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975).

Therefore, in dissolving the temporary restraining order preventing V.C. from obtaining an abortion in New Jersey, or from traveling outside of New Jersey to obtain an abortion, the New Jersey Supreme Court also properly applied this Court's decisions protecting the right to

B. A Man Does Not Have A Constitutional Right To Interfere With A Woman's Decision To Have An Abortion.

Alternatively, petitioner contends that the New Jersey Supreme Court's decision somehow conflicts with the decisions of this Court that allegedly recognize the right of a man, both individually and as representative of the interests of the fetus, to prevent a woman from obtaining an abortion. *See* Cert. Pet. 62-63. As already explained, none of these asserted "rights" can possibly be implicated in this case, because there is no governmental action that interferes with petitioner's interests. *See supra* at 8-9.[14] But even aside from the absence of State action necessary to trigger constitutional protection of petitioner's rights, the simple fact is that petitioner does not and cannot cite any case that actually holds that a man, in any capacity, has any right to interfere with a woman's decision to have an abortion. In fact, the applicable precedent is directly to the contrary.

As this Court recently held in *Casey*, a State cannot interfere with a woman's choice to have an abortion prior to fetal viability. For precisely this reason, the State cannot delegate such power to veto an abortion prior to fetal viability to any other third party. Justice Blackmun, writing for this Court in *Planned Parenthood v. Danforth*,

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travel.

[14] For this reason, the asserted "important questions of federal constitutional law" which petitioner claims are left unsettled by this Court's prior decisions, *see* Cert. Pet. 14-15, are frivolous indeed. Petitioner argues that this Court has only resolved whether a State may prohibit abortion, as opposed to how a conflict between private individuals should be resolved. But in the absence of State action, such a private dispute raises no federal constitutional issues at all.

428 U.S. 52 (1976), struck down a requirement of husband consent for abortion, explaining:

> Clearly, since the State cannot regulate or proscribe abortion during the first stage, when the physician and the patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period.

Danforth, 428 U.S. at 69.

Although petitioner complains that *Danforth* failed to address the interests of the man in the abortion decision, this is clearly wrong. The Court said:

> We are not unaware of the deep and proper concern that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying.

Id. Nevertheless, the Court held:

> It seems manifest that, ideally, the decision to terminate a pregnancy should be one concurred in by both the wife and the husband. No marriage may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and vital an issue. . . .
>
> We recognize, of course, that when a woman, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the

> two marriage partners can prevail. Inasmuch as it is the woman who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.

Id. at 71. As this Court recognized in *Eisenstadt v. Baird*, 405 U.S. 438 (1972):

> [T]he marital couple is not an independent entity with the mind and heart of its own, but an association of two individuals each with a separate intellectual makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether or not to bear or beget a child.

Id. at 453 (emphasis in original).

In the courts below, petitioner argued that *Danforth* was no longer good law, *see* Apx. Vol. II, at 84, but this Court's decision in *Casey* refutes that position. In striking down Pennsylvania's requirement of husband notification for abortion, this Court relied upon and reaffirmed the holding in *Danforth*. *See Casey*, 60 U.S.L.W. at 4812. Distinguishing the very cases petitioner relies on here, *see* Cert. Pet. 62 n.45, this Court recognized that although "with respect to a living child" it "would be reasonable to conclude as a general matter" that the father's and mother's interests are equal, "[b]efore birth, . . . the issue takes on a very different cast. It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's." *Casey*, 60 U.S.L.W. at 4812. For this reason, this Court held, the Constitution protects women from unjustified State interference with their

abortion decisions, "even when that interference is enacted into law for the benefit of their spouses." *Id.* at 4813.

> The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law. A husband has no enforceable right to require a wife to advise him before she exercises her personal choices. . . . A State may not give to a man the kind of dominion over his wife that parents exercise over their children.

Id.

But if a State cannot compel a woman to notify her husband of her abortion decision, *a fortiori* a *non-spouse* cannot be given a *veto* over that choice. The injunction sought by petitioner therefore was an even more extreme invasion of the right of privacy than the statute struck down in *Casey*, and in lifting the injunction the New Jersey Supreme Court correctly followed binding precedent.

C. A Fetus Is Not A "Person" Within The Meaning Of The Fourteenth Amendment.

Petitioner's final argument for granting a writ of certiorari is somewhat incoherent. On the one hand, petitioner argues that the New Jersey Supreme Court's decision conflicts with this Court's prior decisions which allegedly hold that a fetus is a "person" protected by the Fourteenth Amendment of the United States Constitution. *See* Cert. Pet. 60-61. On the other hand, apparently acknowledging that the holding in *Roe v. Wade* is directly to the contrary, *see* Cert. Pet. at 22-23, petitioner urges

that *Roe* should be overruled. Cert. Pet. 29-32, 56-57. Both arguments are without merit.

Roe v. Wade presented the first opportunity to decide whether a fetus is a "person" under the Fourteenth Amendment. After examining both the language of the Fourteenth Amendment and the relevant case law, this Court held that as a matter of law, a fetus is not recognized as a "person" and has no independent rights under the law. *See Roe*, 410 U.S. at 157-58. "[T]he unborn have never been recognized in the law as persons in the whole sense," this Court held, and "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Id.* at 158, 162. Since *Roe*, this Court has repeatedly refused to recognize independent fetal rights. *See Colautti v. Franklin*, 439 U.S. 379 (1979); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983). *Cf. International Union, U.A.W. v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) (employer's "fetal protection" policy excluding women with child-bearing capacity from lead-exposed jobs violates Title VII). As Justice Stevens stated in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), "[n]o member of this Court has ever suggested that a fetus is a 'person' within the meaning of the Fourteenth Amendment." *Id.* at 779 n.8 (Stevens, J., concurring). Most recently, in *Casey* Justice Stevens reiterated:

> Thus, as a matter of federal constitutional law, a developing organism that is not yet a "person" does not have what is sometimes described as a "right to life." This has been and, by the Court's holding today, remains a fundamental premise of our constitutional law governing reproductive autonomy.

Casey, U.S.L.W. at 4817 (Stevens, J., concurring in part and dissenting in part).

Indeed, even Justice Scalia's opinion in *Casey* lends no support to petitioner's contention that a fetus is guaranteed constitutional rights. Justice Scalia argued that the "States may, if they wish, permit abortion-on-demand, but the Constitution does not *require* them to do so." *Id.* at 4836 (Scalia, J., concurring in part and dissenting in part) (emphasis in original). But if a fetus were recognized as a "person" with rights guaranteed under the Fourteenth Amendment, presumably States would be prohibited from allowing legalized abortion.

Thus, petitioner's contention that the New Jersey Supreme Court contradicted this Court's prior decisions is wholly fallacious. Perhaps recognizing as much, petitioner argues in the alternative that *Roe* should be overruled, but he submits no persuasive reason for doing so. Brushing aside concerns for *stare decisis*,[15] petitioner at first apparently admits that whether a fetus is a "person" under the Fourteenth Amendment is a legal question. *See* Cert. Pet. 24; *see also id.* at 26 ("when human life begins is truly a legal question"). But having conceded this point, petitioner can point to *no* development in the law that

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[15]Petitioner argues that *stare decisis* is "not a bar" to overruling *Roe* simply because this Court has overruled prior decisions before. Cert. Pet. 30. But in *Casey*, using a somewhat less simplistic analysis, this Court cogently observed:

> A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law.

Casey, 60 U.S.L.W. at 4805.

undermines *Roe*'s holding that a fetus is not a "person" under the Fourteenth Amendment. Indeed, lower court's have consistently followed this holding,[16] and petitioner cites no contrary authority.[17]

Recognizing the untenable nature of his position, petitioner shifts ground and argues instead that whether a

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[16]*Ruiz Romero v. Gonzales Caraballo*, 681 F. Supp. 123 (D.P.R. 1988) (infant may not maintain claim under 42 U.S.C. § 1983 for prenatal injuries); *Harman v. Daniels*, 525 F. Supp. 798 (W.D. Va. 1981) (fetus has no cause of action under 42 U.S.C. § 1983 or under the Constitution); *Civic Awareness of America, Ltd. v. Richardson*, 387 F. Supp. 1086 (E.D. Wis. 1975) (taxpayers lack standing to sue on behalf of fetuses), *aff'd*, 532 F.2d 756 (7th Cir.), *cert. denied*, 429 U.S. 829 (1976); *Poole v. Endsley*, 371 F. Supp. 1379 (N.D. Fla. 1974) (fetus not a child for purposes of Social Security Act and has no cause of action under Section 1983 or Fourteenth Amendment), *aff'd in part & remanded on other grounds*, 516 F.2d 898 (5th Cir. 1975).

[17]Conflating two separate issues, petitioner argues that the State's interest in potential life necessarily confers the status of legal personhood on the fetus. *See* Cert. Pet. 60-62. Once again, petitioner's confusing argument is presented with citations that, when examined, do not support his position. *Snapp v. Puerto Rico*, 458 U.S. 592 (1982), the primary case petitioner relies on, has absolutely nothing to do with abortion and, in any case, stands for exactly the *opposite* of what petitioner asserts. In *Snapp* this Court held that the common law approach to *parens patriae* standing that petitioner advocates here

> has relatively little to do with the concept of *parens patriae* standing that has developed in American law. That concept does not involve the State stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves. In fact, if nothing more than this is involved -- i.e., if the state is only a nominal party without a real interest of its own -- then it will not have standing under the *parens patriae* doctrine.

Snapp, 458 U.S. at 600.

fetus is a "person" turns on "when the life of a human being commences [which] is, fundamentally a question of fact." Cert. Pet. 30. Petitioner then launches into a lengthy and often unintelligible discussion of alleged "recent scientific discoveries" (based in large part on materials never submitted in the courts below). Apparently, this exposition is designed to demonstrate that life begins at conception, although petitioner's repeated focus on late term abortions suggests he is advancing a somewhat more modest claim. *See, e.g.*, Cert. Pet. 56-57.

In any case, petitioner's argument is fatally flawed in at least two respects. First, petitioner never explains why the legal question of whether a fetus is a "person" under the Fourteenth Amendment turns on whether life begins at conception. Second, petitioner's factual assertions, whatever they may be worth, go not to the issue of when life begins, in terms of what characteristics a fetus must possess to be deemed human, but rather to what characteristics a fetus possesses. The proferred evidence does not prove that life begins at conception, but merely begs the question. In other words, the fact that an eight-week old fetus has fingers is not probative, for example, unless we know that fingers are what define human life.

Petitioner's factual assertions cannot answer this "difficult question of when life begins" precisely because it is a metaphysical issue whose philosophical and theological components necessarily frustrate consensus.

> When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

Roe, 410 U.S. at 159.

In fact, there is no consensus in the scientific community that life begins at conception. *See*, *e.g.*, Declaration of Michael V.L. Bennett, paras. 2-9 (May 15, 1990), filed in *Doe v. Ada*, No. 90-00013 (D. Guam), App. 4a-8a.[18] *See also Webster*, 492 U.S. at 571 & n.16 (Stevens, J., concurring in part and dissenting in part) ("the intensely divisive character of the national debate over abortion reflects the deeply held religious convictions of many participants in the debate. . . . No fewer than 67 religious organizations submitted their views as *amicus curiae* on either side of [the] case"). In hearings before Congress on the so-called "Human Life Bill," for example, the National Academy of Sciences stated that "[d]efining the time at which the developing embryo becomes a person must remain a matter of moral or religious value." App. 6a. Likewise, Joseph Boyle, M.D., the Chair of the Board of Trustees of the American Medical Association, testified that the question of whether human life begins at conception goes "far beyond the realm of medical science and into social, religious, philosophical, ethical, and moral concerns." App. 7a.[19]

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[18]The Bennett Declaration was submitted by respondent in the courts below and made part of the record. *See* App. 1a-3a.

[19]Petitioner concedes that there is no consensus in the scientific community for the view that life begins at conception, but he insists that scientists who do not share this belief are merely "inject[ing] their personal religious, moral and social bias [sic] into their answer." Cert. Pet. 26. With all due respect, it is petitioner's view that "the human is biologically complete at conception," *id.*, that reveals a profound confusion of science and religion. Curiously, in his original certification in support of his application for temporary restraints, petitioner did not mention any "scientific" evidence at all, but instead expressed his opposition to abortion largely in terms of his religious

II. THE NEW JERSEY SUPREME COURT'S DECISION CONFORMS WITH THE DECISIONS OF EVERY APPELLATE COURT TO CONSIDER THE ISSUE.

A. No State Appellate Court Has Ever Held That A Man May Prevent A Woman From Obtaining An Abortion.

Since this Court's decision in *Roe v. Wade*, literally dozens of cases brought by husbands or putative boyfriends have sought to prevent women from exercising their right to choose abortion. To respondent's knowledge, every case has rejected the precise arguments petitioner makes here, and has held that a man does not have the right to a court order enjoining a woman from exercising her abortion right. This has been true in cases where the man seeking the court order was the woman's husband, *see Conn v. Conn*, 525 N.E.2d 612 (Ind. Ct. App.), *aff'd & opinion adopted*, 526 N.E.2d 958 (Ind.), *cert. denied*, 488 U.S. 955 (1988); *Coleman v. Coleman*, 57 Md. App. 755, 471 A.2d 1115, *cert. denied*, 298 Md. 353, 469 A.2d 1274 (1984); *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128 (1974); *Meyers v. Lewis*, No. 111440 (Mich. App. Sept. 15, 1988), *appeal denied*, No. 841469 (Mich. Sept. 22, 1988), *cert. denied*, 488 U.S. 967 (1988); *Steinhoff v. Steinhoff*, No. 10549/88 (N.Y. Sup. Ct. June 29, 1988); *Anderson v. Anderson*, No. 8821320 (Minn. Dist. Ct. July 8, 1988); *Hayes v. Hayes*, No. 85-CI-04460 (Tex. Dist. Ct. Mar. 27, 1985), as well as where the man was not the woman's husband but claimed to be responsible for the woman's pregnancy, *see Doe v. Smith*, 527 N.E.2d 177 (Ind. 1988), *cert. denied*, 429 U.S. 919 (1989); *Doe v.*

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beliefs. *See* Apx. Vol. I, at 18-19.

Roe, No. 88-1629 (N.Y. Sup. Ct. Sept. 14, 1988), *appeal dismissed as moot*, 552 N.Y.S.2d 75 (App. Div. 1990); *Rothenberger v. Doe*, 149 N.J. Super. 478, 374 A.2d 57 (Ch. Div. 1977); *Jones v. Smith*, 278 So.2d 339 (Fla. 1973), *cert. denied*, 415 U.S. 958 (1974); *Pagel v. Roe*, No. 83-765 (Wis. Ct. App. Apr. 21, 1983); *Yozie v. Munson*, No. 82/19 56 S (Conn. Super. Ct. Sept. 28, 1982). *See also Przybyla v. Przybyla*, 87 Wis. 2d 441, 275 N.W.2d 112 (Ct. App. 1978) (woman's exercise of right to terminate her pregnancy without consent of husband cannot support recovery by husband for intentional infliction of emotional distress).

Throughout this litigation, petitioner has cited not even one case in conflict with the New Jersey Supreme Court's decision below. This case and the foregoing authorities were correctly decided, and there is no reason to disturb this clear and unbroken line of precedent.

B. Every Federal Court To Address The Issue Has Held That Husband Notice Or Consent Requirements For Women Seeking Abortion Are Unconstitutional.

Just as State courts have consistently held that men do not have a right to court orders enjoining their wives or girlfriends from having abortions, since this Court's decision in *Danforth* invalidating Missouri's requirement of spousal consent for abortion, to respondent's knowledge every federal court to address the issue has struck down related statutory requirements of husband notice or consent for abortion. *See, e.g.*, *Planned Parenthood v. Casey*, 947 F.2d 682, 709-15 (3d Cir. 1991) (invalidating husband notice requirement), *aff'd*, 60 U.S.L.W. 4795 (U.S. June 29, 1992); *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980) (same); *Eubanks v. Brown*, 604 F. Supp. 141, 148 (W.D.

Ky. 1984) (same); *Planned Parenthood v. Board of Medical Review*, 598 F. Supp. 625, 637 (D.R.I. 1984) (same); *Scheinberg v. Smith*, 482 F. Supp. 529 (S.D. Fla. 1979), *aff'd in part, vacated in part, & remanded*, 659 F.2d 476 (5th Cir. Unit B Oct. 1981), *on remand*, 550 F. Supp. 1112 (S.D. Fla. 1982); *Doe v. Deschamps*, 461 F. Supp. 682, 686 (D. Mont. 1976) (same); *Wolfe v. Schroering*, 541 F.2d 523 (6th Cir. 1976) (invalidating husband consent requirement even in second trimester).

Plainly, the decision of the New Jersey Supreme Court was fully in accord with these federal decisions. Once again, petitioner cites no contrary authority, nor provides any reason for departing from this consistent line of cases.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

July 23, 1992

Respectfully submitted,

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APPENDIX

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On Behalf of the ACLU of New Jersey
Attorneys for Defendant V.C.

J. M., Individually and as guardian ad litem of his unborn child,	:	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION
Plaintiff,	:	DOCKET NO. MON-C-66-92
vs.	:	Appellate Docket Nos. AM-742-91TS, M-3884-91, M-3886-91
V.C., W.M.C., JOSEPH BLOW and RICHARD ROE, fictitious names of real individuals who are employees and agents of the defendant corporation	:	Supreme Court Docket No. 35,000
	:	Civil Action
Defendants.	:	CERTIFICATION OF ANDREW DWYER IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

ANDREW DWYER hereby certifies as follows:

1. I am co-counsel for defendant in this case and am familiar with the facts and proceedings herein.

2. When defendant appealed to the New Jersey Supreme Court, seeking to lift the temporary restraints imposed on her and to dismiss the complaint, we submitted in support of her appeal, *inter alia*, the Declaration of Michael V.L. Bennett. Because of the emergent circumstances of this case, we did not previously submit this declaration to this Court or the Appellate Division. A true and correct copy of the Bennett Declaration is attached hereto.

3. The Bennett Declaration was originally submitted in support of plaintiff's motion for summary judgment in *Doe v. Ada*, No. 90-00013 (D. Guam) (*sub nom. Guam Soc'y of Obstetricians & Gynecologists v. Ada*). This case is a challenge to Guam's criminal abortion statute, and my office represents the plaintiffs who are challenging the law. The district court granted our motion and enjoined the statute, and its decision was recently affirmed by the Ninth Circuit. *See Guam Soc'y of Obstetricians & Gynecologists v. Ada*, No. 90-00013 (D. Guam Aug. 23, 1990), *Aff'd*, No. 90-16706 (9th Cir. Apr. 16, 1992).

4. The Bennett Declaration is relevant in this case, because it explains why the question of when life begins turns on religious, moral and philosophical considerations, such that it cannot be determined by "scientific" evidence alone.

5. In the New Jersey Supreme Court, plaintiff moved to strike this declaration (as well as another declaration submitted by defendant). The Court, however, denied this

motion in it entirety. Therefore, the Bennett Declaration is properly part of the record and before this Court.

6. I hereby certify that the foregoing statements made by me are true. I am aware that if the foregoing statements made by me are willfully false, I am subject to punishment.

/s/
ANDREW DWYER

DATED: April 21, 1992

IN THE UNITED STATES DISTRICT COURT OF GUAM FOR THE TERRITORY OF GUAM

MARIA DOE, on behalf of herself and all others similarly situated, *et. al*,	)	CIVIL ACTION NO. 90-00013
Plaintiffs,	)	DECLARATION
vs.	)	OF MICHAEL V.L. BENNETT
JOSEPH F. ADA, *et. al.*,	)	
Defendants.	)	

1. I am a Professor and Chairperson of Neuroscience at the Albert Einstein College of Medicine in the Bronx, New York. I am a member of the National Academy of Sciences. Attached to this Declaration as Exhibit A is a copy of my curriculum vitae, which includes a list of some of my publications. I am submitting this Declaration in support of plaintiffs' motion for summary judgment and permanent injunction against Public Law 30-134 ("the Act").

2. There is no scientific consensus that a human life begins at conception, at a given stage of fetal development, or at birth. The question of "when a human life begins" cannot be answered by reference to scientific principles like those with which scientists predict planetary movement. The answer to that question will depend on each individual's social, religious, philosophical, ethical and moral beliefs and values. These answers do not represent any "scientific" truth, because they are based upon values

and beliefs, not upon science alone.

3. The only "consensus" that may be said to exist among scientists on the question of when a human life begins is that science alone cannot answer that question. This is demonstrated by the response of the scientific community when in 1981 a United States Senate subcommittee held hearings on a bill to declare "that present day scientific evidence indicates a significant likelihood that actual human life exists from conception." *See The Human Life Bill: Hearings Before the Subcommittee on Separation of Powers of the Senate Committee of the Judiciary*, 97th Cong., 1st Sess. (1981) [hereinafter *Hearings*]. As distinguished scientists testified, science alone does not provide the answer to this question.

4. For example, Dr. Leon Rosenberg, then Chairman of the Department of Human Genetics, Yale University Medical School testified:

> When does this potential for human life become actual? As a scientist, I must answer I do not know. Moreover, I have not been able to find a single piece of scientific evidence which helps me with that question.
>
> Not surprisingly, a great deal has been spoken and written on the subject. Some people argue, as you have heard, that life begins at conception. . . .
>
> I have no quarrel with anyone's ideas on this matter so long as it is clearly understood that they are personal beliefs based on personal judgments and not scientific truths.

Id. at 50.

5. Dr. Rosenberg then explained the reason science alone cannot answer the question -- the inability to test the hypothesis by the scientific method:

> The scientific method depends on two essential things -- a thesis or idea and a means of testing that idea. Scientists have been able to determine, for instance, that the Earth is round or that genes are composed of DNA because, and only because, experiments could be performed to test these ideas. Without experiments there is no science, no way to prove or disprove any idea. I maintain that concepts such as humanness are beyond the purview of science because no idea about them can be tested experimentally.

Id.

6. The National Academy of Sciences was equally emphatic:

> It is the view of the National Academy of Sciences that the statement in [Senate Bill S. 158] cannot stand up to the scrutiny of science. This section reads: "The congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception." This statement purports to derive its conclusions from science, but it deals with a question to which science can provide no answer. The proposal in S. 158 that the term "person" shall include "all human life" has no basis within our scientific understanding. Defining the time at which the developing embryo becomes a person must remain a matter of moral or religious value.

Id. at 74. *See also id.* at 1035-36 (statement of Joseph Boyle, M.D., chairman of the board of trustees of the American Medical Association) (there is no scientific consensus that a human life begins at conception; that question goes "far beyond the realm of medical science and into social, religious, philosophical, ethical, and moral concerns").

7. Science can indeed provide valuable information and can answer concrete questions regarding prenatal development by identifying, for example, the stages of fetal brain development. But the question of when a human life truly begins calls for a conclusion as to which characteristics define the essence of human life.

8. Many other physicians and scientists made these observations at the 1981 hearings. *See, e.g., id.* at 68 (statement of Robert H. Ebert, M.D., President of Milbank Memorial Fund, Caroline Shields Walker, Professor of Medicine Emeritus, Harvard University) (whether a human life begins at conception is not a medical or scientific question, but a philosophical and religious question that "can be debated endlessly and has to do with how one defines a person and 'self'"); *id.* at 69-70 (statement of Sherman M. Mellinkoff, M.D., Dean of the UCLA School of Medicine) (same); *id.* at 71 (statement of Arno G. Motulsky, M.D., Professor or Medicine and Genetics, University of Washington) (same); *id.* at 113-14 (statement of Dr. Jessica G. Davis, Director, Child Development Center, Chief, Division of Genetics, North Shore University Hospital) (same). The subcommittee also received hundreds of letters from scientists and physicians across the country echoing Dr. Rosenberg's views. *See*

e.g., *Hearings app.* 414, 669, 716, 718.[1]

9. Science cannot define the essential attributes of human life any more than science can define such concepts as love, faith or trust. *Hearings* at 50. This United States Supreme Court was indisputably correct when it observed in *Roe v. Wade*, 410 U.S. 113, 159 (1973), that the question of when human life begins cannot simply be referred to an expert discipline for resolution.

10. While science cannot tell us which biological attributes establish the existence of a human being, science can tell us when certain biological attributes can be detected. For example, it is not until sometime after twenty-eight weeks of gestation that the fetal brain has the capacity to carry on the same range of neurological activity as the brain in a full-term newborn. Fetal brain development is obviously a long and incremental process. Brain cells in the neocortex, the portion of the brain in which the processes we call thought, emotion and consciousness occur, must be sufficiently developed to permit this kind of neurological activity to take place.

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[1] The fact that the subcommittee itself could not reach agreement on the question further highlights the inability to find the answer in scientific truth. *The Human Life Bill -- S. 158: Report by the Subcommittee on Separation of Powers, Senate Committee on the Judiciary*, 87th Cong., 1st Sess. 39, 41 (1981) (minority view of Senator Baucus) ("If the Hearings on S. 158 held by the Separation of Powers Subcommittee were conclusive on any point it is that in 1981 there remains no consensus among scientists, philosophers and theologians on the question of when life begins."). Indeed, the current Commissioner of the Food and Drug Administration, Frank E. Young, M.D., stated in 1981 that "science and medicine cannot unequivocally establish the time in the continuum of development where human life begins"; the decision is "in part moral, ethical, philosophical and religious." *Hearings app.* at 781.

11. At about twenty-eight weeks of gestation, brain development is marked by the sudden emergence of dendritic spines in the neocortex. Dendritic spines are essential components in the brain's cellular circuitry.[2] One study has indicated that neocortical cells possess no dendritic spines as late as 24 to 27 weeks of gestation.[3] It is also at that time that large-scale neocortical synaptogenesis (the development of neural connections between brain cells in the neocortex) begins,[4] although limited synaptogenesis may begin as early as 19 to 22 weeks of gestation.[5] Some primitive motor activities such as swallowing and spontaneous movement of limbs, begin between eight and thirteen weeks of gestation.[6] However, the thalamocortical connections which are prerequisites for neocortical reception of bodily sensation do not begin to develop until approximately 22 or 23 weeks.[7]

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[2] M. Flower, *Neuromaturation and the Moral Status of Human Fetal Life* in Abortion Rights and Fetal Personhood 71, 77 (Doerr & Prescott ed. 1989) (emphasis in original) (forthcoming).

[3] D.P. Purpura, *Morphogenesis of Visual Cortex in the Preterm Infant* in Growth and Development of the Brain, 33, 46 (M.A.B. Brazier ed. 1975) (examining the visual cortex).

[4] *Id.* 45-46.

[5] Molliver, Kostovic & Van Der Loos, *The Development of Synapses in Cerebral Cortex of the Human Fetus*, 50 Brain Research 403-07 (1973).

[6] Flower, *supra* n.1 at 75.

[7] Kostovic & Goldman-Rakic, *Transient Cholinesterase Staining in the Mediodorsal Nucleus of the Thalamus and its Connections in the Developing Human and Monkey Brain*, 219 Journal of comparative Neurology 431-47 91983); Kostovic & Rakic, *Development of prestriate Visual Projections in the Monkey and Human*

12. In addition, regular patterned electro-encephalograms (EEGs) with characteristics of an adult EEG appear at approximately 30 weeks.[8] Of course, the fact that the fetus develops the bare biological capacity for crucial neurological processes does not necessarily mean that these neurological processes actually begin to occur in this period. Indeed, the cerebral cortex is relatively nonfunctional even in normal newborns.[9]

13. The neurobiological data indicate that the fetus lacks the physical capacity for the neurological activities we associate with human thought until sometime after 28 weeks gestation. In other words, the capacity for the human thought process as we know it cannot exist before that time. Thus, although people may have different views as to whether the capacity for human thought is relevant to status as a human being, the argument that a fetus should have the status of a born person because science shows that a fetus is able to think is false.

14. The Act's finding that human life begins at the moment of conception cannot draw support from science or scientific evidence. The Act's legislative findings represents the philosophical or religious judgment that human life begins at conception, and cannot be justified as legislation that merely restates a scientific fact.

Fetal Cerebrum Revealed by Transient cholinesterase Staining, 4 Journal of Neuroscience 25-42 (1984).

[8] Flower, *supra* n. 1 at 79.

[9] Shewmon, Capron, Warwick & Schulman, *The Use of Anencephalic Infants as Organ Donors: A Critique*, 261 Journal of American Medical Association 1773-18 (1989).

WHEREFORE, I respectfully request that the Court grant plaintiff's Motion for Summary Judgment and Permanent Induction.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 15, 1990

/s/
Michael V.L. Bennett